(Spl.-H.C.A.S.,C.D.,78-e)

FARAD CONTINUATION SHEET NO.
IN THE HIGH COURT OF BOMBAY AT GOA
APPELLATE SIDE

WRIT PETITION NO. 661 OF 2003

Office Note, Office Memoranda of Quorum, appearances, Court's orders or directions and Registrar's orders.	Court's or Judge's Orders

Shri S. G. Dessai, Senior Advocate with Shri N. Purushan, advocate for the petitioners.

Shri Sudin Usgaokar with Ms. R. Kamath, advocate for the respondent.

CORAM : SMT. NISHITA MHATRE, J.

DATE : 5th February, 2004

P.C.:

This petition challenges the Order of the Civil Judge, Senior Division, Panaji, allowing an amendment application filed by the respondent/plaintiff. The suit was filed for dissolution of the Partnership, Accounts, Distribution of the Partnership Assets and for a permanent injunction. By the amendment the plaintiff sought to incorporate in the plaint, a specific prayer for eviction of the defendant no.2 from the suit premises. The trial Court has allowed the amendment. In paragraph 12, the trial Court has observed

that the issue of limitation raised by the defendants can be considered during the trial. It cannot be decided at the threshold on a mere plea being raised in reply. In the facts of the case it is a mixed question of fact and law and, therefore, the same can be decided at the trial. However, in paragraph 15 the learned Judge has held that the relief of recovery of possession which is sought by the amendment is within 12 years and hence it would not be barred by the law of limitation. On this ground the trial Court allowed the amendment.

2. The learned counsel for the petitioners has submitted that the amendment sought after a passage of 11 years cannot be granted firstly because the cause of action had arisen in 1992 according to the Plaintiff and as stated in the application for amendment, and secondly, because the application consisted of certain pleadings which would show that a new cause of

action was being raised.

3. He relies on the judgment of the Apex Court in the case of **Radhika Devi vs. Bajrangi Singh & Ors.,** reported in (1996)7 SCC 486 and in the case of **Shakuntala J. Gujar vs. Dilip R. Pawar & Anr.,** 2001(3) Bom.C.R. 247 of this Court.

4. There is no doubt that while allowing the application for amendment the trial Court has erred in observing in paragraph 15 that the question regarding limitation can be decided at this stage itself. As stated above, the trial Court ought to have continued the line of reasoning found in para 12 of the order and while allowing the amendment ought to have considered the question of limitation when the suit was posted for trial.

5. The next point raised by Shri Dessai learned counsel for the Petitioners regarding a new cause of action being raised by the amendment

which was different from what was pleaded in the plaint itself, cannot be accepted. What has been sought by the amendment are consequential prayers, based on the pleadings in the Suit. Reliance placed by the learned counsel on the judgment reported in 2001(3) B.C.R., 247 is not relevant as I have already concluded tht the amendment sought will not change the nature of the Suit.

6. In view of this, the petition is rejected. However, it is made clear that the question of limitation will be decided by the trial Court when the suit is tried.

SMT. NISHITA MHATRE, J.

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